

**RAIL SERVICE COMPETITION COUNCIL  
MINUTES OF THE MEETING**

**Wednesday  
September 17, 2008  
10:00am – 3:00pm**

**Transportation Commission Room  
2701 Prospect Ave.  
Helena, Montana**

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**COUNCIL MEMBERS PRESENT:** Vice Chair Carla Allen, John DeMichiei, Bill Fogarty, Doug Miller, Russ Hobbs, Larry Bonderud, Jim Lynch and Ron de Yong

**COUNCIL MEMBERS ABSENT:**  
Sen. Ken Hansen, Rep. Mike Milburn, Evan Barrett, Dan Bucks and Chair Mike O'Hara

**REPRESENTING COUNCIL MEMBERS:**  
Larry Finch for Dan Bucks; Chris Ageson for Evan Barrett

**AGENCY REPRESENTATIVES AND GUESTS:**  
Zia Kazimi, Hal Fossum, Mike Opar, Barbara Ranf, George Paul, MaryAnn Fiehrer, Tom Coston, Mark Blazer, Gary and Patty Schlaeger, Sen. Jerry Black, Joel Clairmont and Court Jensen

**RSCC ADMINISTRATIVE ASSISTANCE:** Gloria O'Rourke

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**1.0 Approval of Minutes**

Following roll call and introductions, Acting Chair Carla Allen requested a motion to approve the Minutes from the June 18<sup>th</sup> meeting. Larry Bonderud moved to approve the Minutes, Russ Hobbs seconded the motion. All voted in favor.

**2.0 Review and Refine RSCC Strategic Plan**

**2.1 Review Information provided by the Subcommittees – includes Public Comment**

The strategic plan draft was compiled from information gathered and discussed at the June 18<sup>th</sup> meeting. The RSCC members present reviewed the document and made changes as below. Each subcommittee will meet to fill information gaps and report at the next RSCC meeting. Montana Department of Transportation representatives will also review the document and fill in areas of work that pertain to them.

**Rail Service Competition Council Strategic Plan  
As of September 17, 2008**

**Forest, Paper, and Industrial Products Shipping**

**Goal 1: Improve access for forest, paper and industrial products to southern markets in U.S. via Union Pacific, Canadian Pacific, and/or other rail service providers.**

Objectives:	Action Items:	Responsible Parties:	Estimated Costs:	Projected Deadlines:
1.1 Improve understanding of the "paper barriers" created by contractual and regulatory issues between carriers and between carriers and consumers.	1.1.1 Research and report to RSCC on the nature of "paper barriers" created by contractual and regulatory issues presently affecting rail service access for forest, paper, and industrial products shipping especially focusing successful models presently being used in other states.	Russ Hobbs, MDT, Terry Whiteside, Railroads, including shortlines		
1.2 Investigate possible roles for state government in negotiating contracts, in creating incentives and in addressing regulatory	1.2.1 Research on possible roles for state government in negotiating contracts, in creating incentives and in addressing regulatory issues to overcome these			

issues to overcome these "paper barriers".	"paper barriers" especially focusing on successful models presently being used in other states.			
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## Ports/Intermodal Shipping

### Goal 2: Enhance access to intermodal rail service available to Montana consumers.

Objectives:	Action Items:	Responsible Parties:	Estimated Costs:	Projected Deadlines:
2.1. Identify market thresholds necessary to renew and/or expand intermodal services from both rail service and/or container providers.	2.1.1 Work with rail service providers and container providers serving Montana to clarify market thresholds necessary to renew and/or initiate intermodal service for consumers within the state. 2.1.2 Work with container providers to clarify market thresholds for expanding intermodal container access to the more consumers with the state.	Bill Fogarty		
2.2 Investigate creative ways to the increase ready access to greater numbers of intermodal containers than is presently experienced by Montana's perspective consumers	2.2.1 Investigate the possibility of using salvaged intermodal containers to increase container access for Montana's consumers. 2.2.2 Investigate the possibility of creating a state-owned fleet of intermodal containers for use by Montana's consumers. 2.2.3 Investigate the development of intermodal loading centers in cooperation with the state's short line carriers.	2.2.2 – GOED and MDT		
2.3 Create a possible incentive program to encourage carriers, container providers, and/or the Montana Board of Investments to partner in funding various solutions.	2.3.1 Identify best practices solutions by researching and reporting on the successful efforts of other states in addressing similar issues. 2.3.2 Identify interested partners among short line carriers, container providers, and investors to begin development of one or more best-practices solutions identified.			

## Agricultural Products Shipping

### Goal 3: Enhance access for agricultural commodities shippers to rail service Montana's agricultural products competitive both nationally and internationally.

Objectives:	Action Items:	Responsible Parties	Estimated Costs:	Projected Deadlines:
3.1 Improve access to affordable rail service for Montana's agriculture producers in turn improving market access for agricultural products both nationally and internationally.	3.1.1 Investigate new partnerships and ways to increase and improve access to UP and CP loading facilities through the use of alternative rail service providers. 3.1.2 Investigate ways to develop and/or redevelop loading facilities for agriculture products across Montana. 3.1.3 Investigate ways to develop	Will need to involve grain companies and railroads and MGGA.		

	new partnerships to bring together the necessary number of carloads to meet Class 1 Railroad requirements.			
3.2 Improve access to intermodal rail service for Montana's specialized agriculture producers in turn making agriculture products more competitive nationwide.	3.2.1 Develop incentives to influence Class 1 carriers to improve and expand intermodal access. 3.2.2 Explore successful models for expanding intermodal access in other states. 3.2.3 Explore the issue of haulage rights as it has been successful addressed in other state models. 3.2.4 Consider establishing a state rail authority to work with both rail service providers and consumers. 3.2.5 Revisit the issue of "Common Carrier Obligations" presently being reviewed by Congress.	3.2.2 – MDT 3.2.3 – MDT 3.2.4 – MDT  3.2.4 – Carla, Evan, Larry, Russ and Jim Lynch (MDT)  3.2.5 Terry Whiteside		

## Coal Shipping

**Goal 4: Enhance access to both local, short line rail service, and national rail service for Montana's coal keeping it competitive in both the booming national and international marketplace.**

Objectives:	Action Items:	Responsible Parties:	Estimated Costs:	Projected Deadlines:
4.1 Explore ways to increase existing rail service capacities and to develop new rail service capacities for coal shipments to both growing national and international markets.	4.1.1 Develop an effective partnership with BNSF to address the need for expanding rail service capacities for Montana's growing coal industry. 4.1.2 Develop new partnerships to address the growing need for spur development from new and/or expanding mining sites to national rail service providers. 4.1.3 Provide information to the Governor's Office of Economic Development to bring pressure on the inactive STB to address issues concerning shipping rates, etc. 4.1.4 Provide information to the Governor's Office of Economic Development office to bring information to the legislature to quantify the impact of Montana's Coal Severance Tax on the competitiveness of the state's coal.			

### Action Items:

- A subcommittee was formed to provide information and examples on item 3.2.4 "Consider establishing a state rail authority to work with both rail service providers and consumers" for the next RSCC meeting. Subcommittee members include Carla Allen, Evan Barrett, Larry Bonderud, Russ Hobbs and Jim Lynch.
- When subcommittees meet to address the four areas of the Strategic Plan they are to fill in as much information as possible, prioritize items and consider items that will be addressed across all four areas.

## 2.2 Public Comments Received

The only public comment received from the RSCC Draft Report was from BNSF. The information addressed issues in each of the four areas outlined in the Draft Strategic Plan. Copies of the BNSF response were provided to RSCC members for review.

## 3.0 Review of Montana Legislature Report

Several people associated with the RSCC received an email from Pat Murdo, Legislative Services, that a report was due on September 12<sup>th</sup> to the Interim Economic Affairs Committee (IEAC). Montana Department of Transportation compiled an abstract for the pending report and Sen. Ken Hansen distributed the four page RSCC Draft Report to the Committee. In addition, Gloria O'Rourke compiled a draft legislative report for the RSCC to review. The RSCC members will review the draft and make recommended changes or additions at the next RSCC meeting. Director Jim Lynch will find out when the final report is due.

## 4.0 Technical Assistance Update

As Terry Whiteside was unable to attend this meeting in person, the RSCC will review Terry's response to BNSF's public comments at the next RSCC meeting.

## 5.0 MDT Reports/Update

### 5.1 Paper Barriers and their Effect on Competition

Hal Fossum, MDT, presented the following information on Interchange Commitments also known as "Paper Barriers".

#### *Interchange Commitments:*

- Are "contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad." (Ex Parte No. 575, STB)
- No single model. Such agreements appear to be diverse in form, duration, restriction, and procedures for waiver.

#### *In defense of paper barriers:*

- Growth and proliferation of short line railroads since Staggers is integral to the Act's success in fostering a healthier, more stable rail industry.
- Interchange commitments provide valuable consideration to smaller carriers, helping short lines acquire or lease rail facilities and so permit their entry.
- Preserve rail transportation to communities where it might otherwise deteriorate or be lost altogether.
- AAR: "... core requirements without which [spin-off] transactions would not and could not take place."

#### *Arguments for reform:*

- Interchange commitments tend to freeze in place the competitive status quo rather than allowing development of new competitive options not available before the transaction.
- Restrain trade by limiting market access of shippers and restricting rail-to-rail competition.
- Heightened railroad competition is needed to encourage competitive response by regional industries. Delivered prices are sensitive to transportation costs. If railroads can capture the value of competitive gains by major production industries, it discourages local investments in productivity, product, and market development.

#### *Railroad Industry Agreement (1998):*

- Established general principles regarding enforceability of paper barriers with respect to new traffic.
- Provides for arbitration. Large majority of cases are resolved.
- Implemented by the Rail Industry Working Group.
- Class I, II, III railroads work cooperatively to increase rail freight business vs. other transportation options.

#### *STB Ex Parte No. 575 (amended May 2008)*

- No general rule: case-by-case consideration of lawfulness of interchange commitments.
- Establishes procedures for disclosure of interchange commitments for future proposed sale or lease arrangements.
- Better equips shippers to challenge an agreement before it takes effect.
- Procedure for an affected party to obtain a copy of an existing agreement in connection with a challenge to it.
- Must show need for the information; standing.
- Must be preceded by a complaint or petition to STB

## 5.2 Comparison of What Other States Have Done Regarding Paper Barriers (ND, SD, WI)

Hal Fossum, MDT, provided the following information:

### *South Dakota*

- SD acquired the Milwaukee Road at the time of its closure, and had leased the core line to BN.
- "Bridge" service negotiated prior to Nov. 2005 sale of the core line to BNSF.
- Applies to shipments originating or terminating in the state.
- Specific industries and branch lines are identified.

### *North Dakota*

- Issue of paper barriers has not been raised.
- Public Service Commission has authority over regulatory issues.
- Cases go to federal STB.
- State is prohibited from owning or operating rail lines. Rail authorities allowed, but none have been established.

### *Wisconsin*

- State is not involved in contesting or resolving paper barriers.
- A private attorney has actively represented grain shippers in this.

## 5.3 Clarification of MDT's role with the RSCC Logistics

Zia Kazimi, MDT, reviewed a list of support items that MDT provides to the RSCC including administrative contract oversight, budget items and reimbursements, meeting facilities and equipment, technical data support, ensuring reports comply with statutory requirements, website maintenance, and editing/review of RSCC publications.

## 5.3 MDT Research Report on State and County Rail Authorities: Who has them, What is Working, What is Not Working.

Hal Fossum, MDT, provided the following information:

### *Railroad Authorities in Montana Statute (MCA 7-14-16 et seq.)*

- ❖ To preserve and improve abandoned rail service, or for preservation of abandoned railroad right of way for future transportation uses.
- ❖ Counties or groups of counties may establish Authorities. None established since the 1993 legislation.
- ❖ Fiscal sources: federal, state, or private ... local mill levy enabled, subject to public ballot.
- ❖ May bond or borrow against any revenue sources.
- ❖ Enabled to operate or use; lease as common carrier; grant privileges to supply goods along the railroad or other property; fix terms and charges; etc.

### *State of Washington*

- ❖ Railroad Authorities enabled by statute, but none created.
- ❖ In 2007, state bought Palouse River & Coulee City Railroad, 300 miles, \$19 mm.
- ❖ Three lessees. Paper barriers handled through AAR "Rule 11," entailing split rates by ownership segments (i.e., short line charges separately from trunk carrier). Minimal state role in negotiation with major carriers.

Successes: Too early to say.

Challenges:

- ❖ Paper barriers: State sunshine laws inhibited public offices from negotiating interchange commitments, due to private concerns about the confidentiality of contract negotiations.
- ❖ Profit squeeze: Small operators; significant deferred maintenance; low density line.

### *State of Oregon*

- ❖ Oregon has one authority, the Willamette Union Railroad Authority, in NE Oregon, 63 miles, purchased for \$6.5 million in 2002.
- ❖ Funds of \$2m state appropriation, \$4.5m state economic development loan. Federal support enabled payback of \$4m of the state loan funds and minimized debt.
- ❖ Eagle Cap Excursion tourism train is now the major rail activity. Wood products shippers have since closed, and fuel imports are now the main commercial traffic. Average freight traffic is less than one freight car-mile per year.

Successes:

- ❖ Line is active & operational. Debt is less than salvage value. Corridor is preserved. Tourism activity benefits local economic development. Wood products shippers could rebound.

Challenges:

- ❖ Maintenance and operating costs; sparse commercial activity.

### *State of Oklahoma*

- ❖ Oklahoma's Legislature created the "Railroad Revitalization Act" in 1978. The act empowered the DOT to act like a Rail Authority in its ability to acquire, construct, operate and maintain railroad right-of-way and trackage projects. The state enters into agreements with owner/operators and carriers for use of rail right-of-way.
- ❖ State owns and leases 900 miles of track, a \$35 million investment. Seven Lessees, nine separate operations.
- ❖ Funds are generated from leases and the Oklahoma Freight Car Tax (4% of gross earnings).
- ❖ Paper barriers have not been an issue. State does not involve itself in negotiations between carriers.

Successes:

- ❖ State-owned rail infrastructure constitutes 24% of routes in service.
- ❖ Act prevented significant abandonment and downsizing of rail infrastructure.
- ❖ Economic growth for areas served.

Challenges: inflationary cost of rail materials reducing buying power.

### *State of Colorado*

- ❖ State of Colorado legislated that a Railroad Authority be created to specifically conduct a feasibility study of high-speed passenger rail in the I-25 and I-70 corridors of Colorado and to connect with other states.
- ❖ CDOT Commission approved \$1,246,000 grant for study. Required 20% match from local communities.
- ❖ Rocky Mountain Rail Authority was formed through inter-governmental agreements with 46 local governments to work with CDOT on feasibility study and high-speed rail issues.
- ❖ \$1.5 million dedicated to the feasibility study which is expected to be completed Spring 2009.
- ❖ No paper barriers - only contractual agreements are intergovernmental and with consultants for study.

Successes:

- ❖ Early in process. Outcome of report will help determine if Colorado will apply for federal designation as a "high-speed rail corridor".
- ❖ Eligible for federal funds with designation.

Challenges:

- ❖ Relocating freight traffic from Front Range to eastern plains to make room for high-speed passenger trains, if feasible.

### *Specific Information on State Rail Authorities*

Larry Bonderud provided handouts regarding research conducted by State Senator Jerry Black on other state's statute language for establishing statewide rail authorities. Larry feels that a state rail authority would be the best vehicle for addressing the needs the RSCC has uncovered and explored. Larry said that in looking back and observing the evolution of the competition issues in Montana, a state rail authority would have been ideal to avoid and or divert current problems. Larry feels a state rail authority would be the logical progression from the RSCC, an authority that would act on, initiate and facilitate rail transportation in the State.

#### **Action Item:**

- A State Rail Authority Working Group was formed to present a specific concept of a Montana State Rail Authority for review by the RSCC at the next meeting. This group will study state rail authorities and make recommendations to the RSCC with possible recommendations to the 2009 Legislature. Working Group members include Chairs and/or representation from each of the Subcommittees: Larry Bonderud, Carla Allen, Evan Barrett, Russ Hobbs and Jim Lynch. It was agreed by the RSCC members present that the statewide rail authority issue would affect all four subcommittees and may need to be a fifth segment of the Strategic Plan.

## **6.0 Rail Updates**

### **6.1 Canadian Pacific (Larry Bonderud)**

Larry Bonderud shared a fact sheet surrounding the proposed merger of the DM& E and IC & E. Larry said the merger is pending because of the role that state government played in past rail issues on behalf of the State of South Dakota.

Larry also reported cooperation between BNSF and CP will result in increased traffic largely due to the booming Alberta economy. There is currently \$9 billion dollars of commerce in this corridor.

### **6.2 Montana Rail Link**

Tom Coston spoke on behalf of Montana Rail Link. Tom said the RSCC is going through an educational process and needs to involve the railroads to get the rail perspective. Tom said MRL is always available and would welcome the opportunity to provide input.

Russ Hobbs asked Tom his opinion on paper barriers. Tom said in his 18 years with MRL there has usually been an opportunity to discuss rates with BNSF, even with interchange agreements in place.

Russ said that his subcommittee concluded it will be through recognizing contractual agreements and finding incentives to re-work them to make progress on competitive freight options for Montana. Russ said there were opportunities to reach into Salt Lake City and Boise but paper barriers were prohibitive. Russ also said the RSCC needs to understand and evaluate paper barriers from not only the railroad's point of view but also the shipper's point of view to determine if they are a blockage to business and a blockage to improving competition in transportation.

### **6.3 BNSF Railway (Barbara Ranf)**

Barbara Ranf reported that BNSF appreciates the ability to provide comment on RSCC activities and looks forward to an ongoing productive relationship. Barbara was pleased to acknowledge the new private shortline, First Energy. BNSF is providing the rail cars; First Energy will provide maintenance on the line.

### **6.4 Central Montana Railroad (Carla Allen)**

Carla Allen had no news to report. The CMR is busy hauling grain.

### **6.5 Watco, Yellowstone, Mission Valley, others**

Mark Blazer presented a slideshow on Watco Companies to the RSCC which included historical data as well as an update on current activities. Watco Companies is celebrating its 25<sup>th</sup> Anniversary and is the third largest shortline railroad in the United States. Mark concluded his presentation with the following summary:

- By creating shortlines in the State of Montana we have been able make marginal branchlines into a viable part of the rail network
- By working in conjunction with the BNSF we continue to provide competitive shipping alternatives to our Montana customers
- In conjunction with the BNSF we see the potential to develop our Montana Shortlines into strategically located industrial parks. This will increase BNSF's velocity by limiting the amount of train starts and stops on their mainline. It also creates opportunities for the smaller shippers whose volume would not justify the expense to locate on the BNSF mainline.

## **7.0 Next Council Meeting**

### **7.1 Meeting Date and Location**

The next meeting of the RSCC will be November 18<sup>th</sup>, 10:00am, in the MDT Commission Room.

### **7.2 Agenda**

The agenda will contain the following items:

- Subcommittee reports regarding strategic plan: fill in costs, timelines, etc., and possibly prioritize items.
- RSCC will address combining issues on strategic plan and overall prioritization of issues
- Terry Whiteside: Report on paper barriers and update on competitive legislation (Rail Competition Act in committee for eight years)
- Review draft of 2009 Legislative Report
- State Rail Authority Working Group will provide fact finding report and make recommendations
- MDT: List items MDT can address in the Strategic Plan also investigate the Commerce Clause (see Public Comment below).

## **8.0 Misc. Comments or Issues from Council Members**

- ☞ Carla Allen was thanked for chairing the meeting in Mike's absence.
- ☞ John DeMichiei said that a shortcut to understanding intermodal trade is to put the shipping community into the same room with the railroad representatives and ask shippers to demonstrate the business opportunity. John said if the business opportunity is present, the action will be taken. John said the intermodal business has been the real growth of railroads in the last two years and the RSCC has an opportunity to drill down to the facts that are impacting intermodal traffic in Montana.

## **9.0 Formal Public Comment Period**

- ☞ Patty Schlaeger commended Larry Bonderud for investigating the State Rail Authority option. Gary Schlaeger commented that many of the Port Authorities have their own railroads and operate them successfully.
- ☞ Gary Schlaeger said it is a little known fact that when the Staggers Act first passed the Constitutional Commerce Clause was not changed to include commerce *within* the states.

## **10.0 Adjournment**

With no further business, Jim Lynch moved to adjourn the meeting. Larry Bonderud seconded the motion. All voted in favor.

RSCC Minutes Sept 17 2008.doc